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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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IN RE JAMES R. HOLLOWAY, PETITIONER

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the court of appeals, in reviewing the sufficiency of the evidence to support a summary contempt conviction, improperly considered conduct that was not cited by the district court.

2. Whether the court of appeals erred in affirming the district court's use of the summary procedures of Fed. R. Crim. P. 42(a), rather than the notice and hearing procedures of Fed. R. Crim. P. 42(b), without determining that the defendant's conduct obstructed the administration of justice, and despite the district court's decision to delay sentencing until five months after the conduct at issue.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

James R. Holloway respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-46a) is reported at 995 F.2d 1080. The order of the district court (App., *infra*, 49a-52a) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on June 11, 1993. A petition for rehearing was denied on September 24, 1993. App., *infra*, 47a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

## STATUTE AND RULE INVOLVED

Section 401 of Title 18, U.S. Code, provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42 of the Federal Rules of Criminal Procedure provides:

> (a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. That notice shall state the time and place of hearing, allowing a reasonable time for preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on

application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

## STATEMENT

Petitioner, an Assistant Federal Public Defender, represented one of six co-defendants in a drug prosecution. During the trial, the district court summarily held petitioner in criminal contempt of court. Later that day, the court issued a written order and certificate of contempt pursuant to Fed. R. Crim. P. 42(a). Five months later, the district court sentenced petitioner to pay a $1,000 fine. A divided court of appeals affirmed. App., *infra*, 1a-46a.

1. Petitioner's client Kelvin Rascoe was charged with possessing more than 5 grams of cocaine base with intent to distribute it. The government's case against Rascoe was based primarily on the testimony of a single police officer, Truesdale, who testified that while executing a search warrant at a house in the District of Columbia, he entered a bedroom and observed Rascoe tossing plastic bags and rocks of crack cocaine into the air. Other officers who entered the room with Officer Truesdale did not see Rascoe toss any objects. App., *infra*, 27a-29a.

Because Officer Truesdale's testimony was the only evidence that Rascoe physically possessed the drugs, attacking Truesdale's credibility was critical to Rascoe's defense.

Petitioner planned to challenge Officer Truesdale's testimony by introducing a contemporaneous statement by Truesdale in which he mentioned only that Rascoe tossed the objects onto the ground. To this end, petitioner called as defense witnesses two police officers, Young and Condit, to lay a foundation for the admission of a *Gerstein* affidavit signed by Officer Condit.[1/] Petitioner planned to show that the body of the *Gerstein* affidavit had been photocopied from a police report dictated to Officer Young by Officer Truesdale. App., *infra*, 29a-30a.

The district court (Norma Holloway Johnson, J.) limited petitioner's examination of Officer Young because it believed that petitioner was attempting to elicit testimony from Young based upon the contents of a document the officer had never seen. In fact, petitioner was merely attempting to elicit the fact that the body of the *Gerstein* affidavit was a photocopy of Officer Young's police report.

After petitioner made several unsuccessful attempts to frame a question that would elicit this fact, the district court summarily found him in criminal contempt of court. Pursuant to Fed. R. Crim. P. 42(a), the court issued a contempt certificate to which it attached eight pages of the trial transcript. App., *infra*, 49a-63a. The certificate made no reference to any events at trial other than those described in the transcript excerpt. App., *infra*, 50a-52a. Five months later, Judge Johnson sentenced petitioner to pay a $1,000 fine and informed his superior that he was not permitted to appear in her courtroom in the future.[2/]

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[1/] A *Gerstein* affidavit is submitted to the court to provide a basis for the judicial finding of probable cause necessary to justify retaining a suspect in custody after an arrest. *See Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

[2/] The district court stayed execution of the sentence pending the completion of any appeal. C.A. App. 106.

2. A divided court of appeals affirmed. App., *infra*, 1a-46a. The court acknowledged that "[n]either the contempt order, the contempt certificate, nor the record indicates which of the three subsections [of 18 U.S.C. § 401 the district court] invoked." App., *infra*, 2a. The court nevertheless held that the conviction was valid under 18 U.S.C. § 401(3) (1988).

The court stated that "[t]he elements of contempt under § 401(3) are straightforward." App., *infra*, 3a. "First, the alleged contemnor must "[d]isobe[y] or resist[] . . . [the] lawful writ, process, order, rule, decree, or command" of the court." *Id.*, quoting 18 U.S.C. § 401(3). "Second, . . . [t]he disregard of authority must be willful." App., *infra*, at 3a. The court stated that "willfulness may be inferred if a lawyer's conduct discloses a reckless disregard for his professional duty." *Id.* (internal quotation omitted). The court further stated:

> While the reviewing court may not affirm if the *cited* conduct has not been contumacious, . . . the analysis of intent properly encompasses the contemnor's behavior in related instances such as disobedience or resistance to other orders of the court.

*Id.* at 3a-4a (emphasis in original), citing *United States* v. *Lumumba*, 794 F.2d 806, 811 (2d Cir.), *cert. denied*, 479 U.S. 855 (1986); *In re Farquhar*, 492 F.2d 561, 564 (D.C. Cir. 1973).

The court of appeals concluded that petitioner had disobeyed the district court's order. App., *infra*, 7a. The district court "made it plain that [it] would not allow the witness to compare the wording in the documents unless it were first established that the witness had seen the *Gerstein* affidavit before." *Id.* at 7a-8a.

The court further concluded that petitioner acted with culpable intent. The court stated that petitioner's "devious pretense that it would be enough if Young saw the document in court that very day . . . points strongly in the direction of willfulness." App., *infra*, 9a. But the court concluded that it "need not . . . rest on the cited colloquy alone," because "[o]ther episodes of [petitioner's] conduct in the *Rascoe* trial render the conclusion that he acted with culpable intent almost inescapable." *Id.* The court proceeded to consider three incidents that were not mentioned in the district court's contempt order or certificate. *Id.* at 9a-12a. The court left open the possibility that "a reviewing court may look at incidents from other trials to evaluate the contemnor's intent." *Id.* at 10 n.4.

In addition, the court of appeals concluded that the district court properly employed the summary contempt procedures of Fed. R. Crim. P. 42(a) rather than the notice and hearing procedures of Rule 42(b). App., *infra*, 12a-14a. The court found that "the necessity of preserving order justified use of 42(a)," because the district court "had a compelling need to terminate the improper questioning of Young, to deter future intentional violations of her orders, and to vindicate judicial authority to control the courtroom." *Id.* at 13a.[3/]

Chief Judge Mikva dissented. App., *infra*, 27a-46a. He concluded that "[w]hat occurred between [petitioner] and [the district court] was quite typical of the frequently murky and unproductive exchanges that characterize so much of trial practice." *Id.* at 35a. He found no evidence in the record that petitioner actually obstructed justice. Petitioner "did not raise his voice or treat the judge with disrespect, and the entire incident covers two pages of the transcript and probably

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[3/] The court of appeals also held that the district judge was not required to refer the matter to another judge, App., *infra*, 14a, and that the $1,000 fine was not excessive, *id.* at 14a-16a.

consumed less than a minute." App., *infra*, 37a, citing *In re McConnell*, 370 U.S. 230, 235-36 (1962). The dissenting judge noted that "other appellate courts have declined to find obstruction in cases involving conduct far more egregious than that at issue here." App., *infra*, 38a (citing cases).

Chief Judge Mikva also concluded that the contempt certificate did not set forth facts that established willfulness and contumacious conduct beyond a reasonable doubt. App., *infra*, 39a-42a. He concluded that the district court's directions to petitioner were not clear and unequivocal, and thus could not be a basis for convicting him of criminal contempt. The dissenting judge disagreed with "[t]he majority's efforts to infer contumacious intent from other incidents of allegedly contumacious conduct in the record." *Id.* at 43a. "Where the actions described in the contempt certificate, taken alone, are insufficient to support a conviction for contempt, the contempt conviction may *not* be saved by pointing to similar incidents of borderline, or even contemptuous, conduct in the record." *Id.* at 43a-44a (emphasis in original; citing *Eaton* v. *City of Tulsa*, 415 U.S. 697, 699 (1974)). Because "the district court did not refer to or even hint that the contempt conviction was related to any past instances of misconduct, . . . the majority's attempt to save [petitioner's] conviction by combing the record in search of any minor excess of advocacy . . . is unacceptable." App., *infra*, 44a.

## REASONS FOR GRANTING THE PETITION

This Court has granted review of summary contempt convictions because of the "'importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt.'" *In re McConnell*, 370 U.S. at 233 (quoting *Offutt* v. *United States*, 348 U.S. 11, 13 (1954)). A restrained exercise of the summary contempt power is particularly important in this case, because petitioner was representing a defendant in a jury trial of criminal

charges. In an adversary system based on "partisan advocacy," *Herring* v. *New York*, 422 U.S. 853, 862 (1975), counsel must not be "distract[ed] . . . from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984). Further review is warranted because the court of appeals' decision will chill counsels' zealous representation of their clients.

In addition, the court of appeals' decision conflicts with decisions of this Court and other courts of appeals. In reviewing the sufficiency of the evidence that petitioner acted with culpable intent, the court of appeals relied on incidents that were not cited in the district court's contempt certificate. The court of appeals' decision is contrary to a well-established principle, mandated by due process considerations, that appellate review of summary contempt convictions is limited to conduct cited by the district court. Moreover, the court of appeals held that petitioner was not entitled to notice and a hearing under Fed. R. Crim. P. 42(b), even though the court of appeals did not conclude that petitioner had obstructed the administration of justice, and even though the district court delayed the imposition of punishment until five months after the conduct that gave rise to the conviction. The court's decision conflicts with decisions of other courts of appeals holding that summary conviction under Fed. R. Crim P. 42(a) is improper in these circumstances. The petition for a writ of certiorari should be granted to resolve these conflicts and to protect the integrity of the adversary system.

1. Criminal contempt is "'a crime in the ordinary sense.'" *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993) (quoting *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)). It is "a public wrong which is punishable by fine or imprisonment or both." *Bloom*, 391 U.S. at 201; *see Gompers* v. *United States*, 233 U.S. 604, 610 (1914). Accordingly, "constitutional protections for criminal defendants . . . apply in non-summary criminal contempt

prosecutions just as they do in other criminal prosecutions." *Dixon*, 113 S. Ct. at 2856.

Summary punishment for contempt is an exception to this principle that "always, and rightly, is regarded with disfavor," *Sacher* v. *United States*, 343 U.S. 1, 8 (1952), because it imposes criminal punishment without according basic constitutional protections to the defendant. The trial court acts as prosecutor and jury, and the defendant is not entitled to notice or a hearing. The Court "has long recognized the potential for abuse in exercising the summary power to imprison for contempt." *Bloom*, 391 U.S. at 202 (collecting authorities). Because of this danger, it is well settled that "the procedural requirements of Rule 42(a) must be strictly observed." *United States* v. *Schrimsher*, 493 F.2d 842, 844-45 (5th Cir. 1974) (footnote omitted). *See United States* v. *Marshall*, 451 F.2d 372, 374 (9th Cir. 1971); *Pietsch* v. *President of United States*, 434 F.2d 861, 864 (2d Cir. 1970) (Clark, J.), *cert. denied*, 403 U.S. 920 (1971).

A basic procedural requirement of Rule 42(a) is that the contempt order or certificate "shall recite the facts." Fed. R. Crim. P. 42(a). "This recitation of the facts in the certificate is of critical importance." *Marshall*, 451 F.2d at 374.

> Because the defendant has been convicted without notice or hearing, there is no record of the conviction upon which appellate review may be based. The factual recitation in the certificate supplies this deficiency. Accordingly, '[t]his requirement is more than a formality. It is essential to disclosure of the basis of decision with sufficient particularity to permit informed appellate review.'

*Id.* at 374-75 (quoting *Tauber* v. *Gordon*, 350 F.2d 843, 845 (3d Cir. 1965) (*en banc*)). *See Schrimsher*, 493 F.2d at 845.

In *Tauber*, the court of appeals concluded that the lawyer's behavior on the one occasion specifically identified by the district court was insufficient to support a contempt conviction, and that the conviction could not be affirmed on the basis of the district court's generalized references to the lawyer's course of conduct throughout the trial. 350 F.2d at 845. The court of appeals rejected the prosecutor's effort to support the conviction "by culling from the record and presenting to this court all of the episodes of questionable conduct by Tauber and contention between court and counsel which the court may have had in mind." *Id.* The court held that "counsel's enumeration of occurrences which, in his view after the event, afforded a proper basis for a contempt order cannot be substituted for the required specification by the trial judge of the facts upon which he actually predicated his contempt order." *Id.* "A criminal contempt order, like any other conviction of crime, must stand or fall on the sufficiency of the specification of wrongdoing upon which it is based." *Id.* at 845 n.1.

The rule of *Tauber* and similar cases is mandated by fundamental principles of due process governing appellate review. The district court's order and certificate comprise the record of the facts supporting a summary contempt conviction. Just as an appellate court cannot look outside the record in reviewing the sufficiency of the evidence to support an ordinary criminal conviction, it cannot look beyond the conduct cited by the district court in reviewing a summary contempt conviction. As this Court observed in *Eaton* v. *City of Tulsa*, 415 U.S. 697, 698 (1974), "the question is not upon what evidence the trial judge *could* find petitioner guilty but upon what evidence the trial judge *did* find petitioner guilty."

In *Eaton*, the defendant was convicted of criminal contempt for using an expletive while testifying in court. The state appellate court affirmed the conviction on the basis of its own examination of the trial record, which revealed other incidents of misconduct by the defendant. This Court

summarily reversed. Because "the trial judge rested the conviction upon the use of an expletive only," the state appellate court "denied petitioner constitutional due process in sustaining the trial court by treating the conviction as a conviction upon a charge not made." *Id.* *See Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2082 (1993) (when reviewing court affirms a conviction based on its view of what a reasonable factfinder would have done, "the wrong entity judge[s] the defendant guilty") (internal quotation omitted).

The court of appeals' decision in this case rests on precisely the sort of improper appellate fact-finding that was condemned in cases such as *Eaton* and *Tauber*. The court of appeals did not hold that the conduct identified by the district court was sufficient to support the contempt conviction. Instead, it combed the record for other incidents that were not cited or relied upon by the district court to bolster the sufficiency of the evidence of *mens rea*. Pet. App. 9a-12a. The court of appeals' procedure is equivalent to permitting the government to defend a conviction by presenting new evidence on appeal that was not presented at trial.

Such a procedure cannot be squared with basic due process requirements. Petitioner had no notice that the court of appeals would consider incidents outside the scope of the district court's contempt certificate, he had no opportunity to present evidence of his own concerning those incidents, and there was no procedure available to him to obtain judicial review of the appellate court's findings of fact. Petitioner, having been deprived of notice and a hearing at the trial level, was also deprived of the opportunity to be heard as to the new facts relied upon by the court of appeals. The court of appeals' fact-finding thus subjected petitioner to an impermissible double dose of constitutional deprivation.

There is no basis for the court of appeals' assertion that "the analysis of intent properly encompasses the contemnor's behavior in related incidents such as disobedience or

resistance to other orders of the court." App., *infra*, 3a-4a. Appellate fact-finding concerning *mens rea* is no different from appellate fact-finding concerning other elements of a criminal offense. The court of appeals was not present when the uncited conduct occurred; its impressions gleaned from the transcript may be quite different from those of the district court. The district court may have believed, on the basis of additional information not available to the court of appeals, that the uncited conduct did not support an inference of culpable intent. Indeed, the district court may have been momentarily distracted and thus not have actually seen or heard the uncited conduct. If so, that conduct cannot support a summary contempt conviction. *See* Fed. R. Crim. P. 42(a).[4/]

If the court of appeals is permitted to look beyond the conduct cited by the district court for evidence of *mens rea*, there is no principled reason why it cannot do so for other elements of the offense. And if the court of appeals is permitted to look beyond conduct specified by the district court, there is no reason why it should be confined to the record of the proceedings in which the conduct occurred. Indeed, the court of appeals expressly left open the possibility that a court of appeals may consider incidents of misconduct from other trials. App., *infra*, 10a n.4.

Neither of the decisions cited by the court of appeals supports its position. In *United States* v. *Lumumba*, 794 F.2d 806, 812 (2d Cir.), *cert. denied*, 479 U.S. 855 (1986), the district court's summary contempt findings "quoted from the transcript other prior examples of [the defendant's] conduct

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[4/] In addition, it would have been improper for the district court to convict petitioner summarily under Fed. R. Crim. P. 42(a) for conduct that occurred one or two weeks earlier during the trial. *See* pp. 15-17 *infra*. Thus, it plainly was improper for the court of appeals, more than a year later, to affirm a summary contempt conviction on the basis of uncited conduct without hearing evidence or giving petitioner an opportunity for response.

which support[ed] the inference that he was making a calculated insult to the judge" when he engaged in the cited conduct. The Second Circuit nevertheless *reversed* the district court's summary conviction of a defense lawyer pursuant to Rule 42(a) and remanded for a hearing pursuant to Rule 42(b). *See United States* v. *Lumumba*, 741 F.2d 12 (2d Cir. 1984). The court of appeals subsequently affirmed the lawyer's contempt conviction following a Rule 42(b) hearing in which the entire trial transcript was admitted into evidence. *See* 794 F.2d at 815. In this case, the district court did not refer to other instances of misconduct, and petitioner has not been accorded a hearing pursuant to Rule 42(b).

The court of appeals' reliance on *In re Farquhar*, 492 F.2d 561 (D.C. Cir. 1973), is similarly misplaced. In *Farquhar*, the court reversed a lawyer's summary contempt conviction for appearing late at a court proceeding, noting that there was "no evidence" that the lawyer "was repeatedly unpunctual." *Id.* at 564. The court contrasted Farquhar's situation with that of a lawyer in another contempt proceeding in which the district judge noted on the record "that the attorney's tardiness had 'happened many times in the past.'" *Id.* (quoting *In re Niblack*, 476 F.2d 930 (D.C. Cir.), *cert. denied*, 414 U.S. 909 (1973)).[5/]

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[5/] The court of appeals did not cite or rely on *In re Chaplain*, 621 F.2d 1272, 1276 (4th Cir.) (*en banc*), *cert. denied*, 449 U.S. 834 (1980), a case that increases the divergence in the courts of appeals on this issue. *Chaplain* held that "where the record reveals a pattern of potentially disruptive conduct preceding a summary conviction, the specification of a single episode adequately charges as well the entire course of like antecedent conduct from the time when it was fairly identified to the contemnor as potentially contumacious." Thus, most courts of appeals reviewing summary contempt convictions will not consider uncited conduct; the D.C. Circuit will consider uncited conduct that is relevant to the defendant's intent; and the Fourth Circuit will consider uncited conduct if it is part of a "pattern" of "like antecedent" conduct.

In sum, the court of appeals' reliance on evidence outside the contempt certificate is contrary to decisions of this Court and other courts of appeals, and warrants an exercise of this Court's supervisory authority to ensure that lawyers in criminal cases are not deterred from engaging in the zealous advocacy essential to the "ultimate objective" of the adversary system, that "the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. at 862.

2. The court of appeals also erred in affirming (App., *infra*, 12a-14a) the district court's decision to use the summary procedures of Fed. R. Crim. P. 42(a) rather than the notice and comment procedures of Fed. R. Crim. P. 42(b). Rule 42(b) "provides the normal procedure" for contempt adjudications, *Harris* v. *United States*, 382 U.S. 162, 164 (1965); Rule 42(a) is "reserved for exceptional circumstances, . . . such as acts threatening the judge or disrupting a hearing or obstructing court proceedings," 382 U.S. at 164 (internal quotation omitted). *See also* 1 ABA *Standards for Criminal Justice* Standard 6-4.4 commentary at 53 (1980) (punishment without notice or opportunity to be heard "is inconsistent with the basic notions of fairness, and is likely to bring disrespect on the court").

The court of appeals' approval of the Rule 42(a) procedure is doubly flawed. First, a court of appeals may not affirm a summary conviction under Rule 42(a) unless it determines that the defendant's conduct actually obstructed the administration of justice. The court of appeals made no such determination here; indeed, the court of appeals dismissed the issue as irrelevant. Second, the summary procedures of Rule 42(a) are inappropriate where, as here, the district court delays the imposition of punishment until months after the conduct at issue.

a. In affirming the district court's decision to employ the summary procedures of Rule 42(a), the court of appeals failed to determine whether petitioner actually obstructed the

administration of justice. Although Chief Judge Mikva's dissenting opinion argued at length that there was no obstruction, App., *infra*, 37a-38a, the majority responded only in a footnote, stating that the cases discussed by Chief Judge Mikva "are, insofar as they clarify the meaning of the obstruction of justice element of § 401(1), not pertinent to this opinion." *Id.* at 3a n.1. In holding that the district court properly employed the summary procedures of Rule 42(a), the court of appeals simply ignored the question whether petitioner's conduct obstructed justice. *See* App., *infra*, 12a-14a.

The court of appeals' decision conflicts with decisions of this Court and other courts of appeals holding that the existence of an obstruction of justice is "pertinent" — and, indeed, essential — to a determination of whether the district court may employ the summary procedures of Rule 42(a). This Court has held that "before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice." *In re McConnell*, 370 U.S. 230, 234 (1962); *see also Ex parte Hudgings*, 249 U.S. 378, 383 (1919) ("An obstruction to the performance of judicial duty . . . must clearly be shown in every case where the power to punish for contempt is exerted.").

Similarly, in *Taberer* v. *Armstrong World Indus., Inc.*, 954 F.2d 888, 901 (3d Cir. 1992), the court concluded that "[b]ecause of the danger that the summary contempt power will be abused, both Congress and the Court have narrowed its scope by requiring a showing of obstruction before contempt may be punished summarily." *See also United States* v. *Turner*, 812 F.2d 1552, 1568 (11th Cir. 1987) (Rule 42(a) applies only if "there has been an actual obstruction of justice"); *Vaughn* v. *City of Flint*, 752 F.2d 1160, 1167 (6th Cir. 1985); *Gordon* v. *United States*, 592 F.2d 1215, 1217 (1st Cir.), *cert. denied*, 441 U.S. 912 (1979); 58 A.L.R. Fed. 22, 53-55 (1982) (collecting cases). Further review is

warranted to resolve the conflict between the decision in this case and decisions such as *Taberer*.[6/]

b. In addition, the court of appeals affirmed petitioner's conviction under Fed. R. Crim. P. 42(a) even though the district court did not sentence petitioner until five months after it held him in contempt. The court of appeals' conclusion that the summary procedures of Rule 42(a) apply in these circumstances is contrary to the plain language of Rule 42(a), and conflicts with decisions of other courts of appeals.[7/]

Rule 42(a) provides that in specified circumstances "[a] criminal contempt may be punished summarily." "Summary" means "done or occurring without delay or formality: quickly executed." *Webster's Third New International Dictionary* 2289 (1968). "Summary punishment" is thus punishment "performed or meted out speedily and unceremoniously." *Webster's II New Riverside University Dictionary* 1160 (1988). It follows that a district court may employ Rule 42(a) only if it imposes punishment on the contemnor without

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[6/] Because the court of appeals did not consider whether petitioner's conduct obstructed the administration of justice, there is no occasion for this Court to consider that issue in the first instance. In any event, an incident that "covers two pages of the transcript and probably consumed less than a minute," App., *infra*, 37a, and involves nothing more than defense counsel questioning a witness in the midst of a three-week trial, could not have obstructed justice. Other courts of appeals have found that far more egregious conduct did not obstruct justice. *See, e.g., United States ex rel. Robson* v. *Oliver*, 470 F.2d 10 (7th Cir. 1972); *United States* v. *Sopher*, 347 F.2d 415, 418 (7th Cir. 1965).

[7/] The district court below did not comply with the notice and hearing procedures of Rule 42(b). At the sentencing hearing, the district court expressly noted that "the question of the merits of the underlying contempt order is not properly before the court." C.A. App. 82.

delay. In this case, the imposition of punishment plainly was not speedy.[8/]

In *United States* v. *Lumumba*, 741 F.2d 12 (2d Cir. 1984), the district court cited counsel for contempt on two occasions during the trial. After the trial ended, the court summarily convicted counsel pursuant to Fed. R. Crim. P. 42(a); thereafter, another judge imposed sentence on counsel. The Second Circuit held that the district court was required to proceed under Fed. R. Crim. P. 42(b). The court of appeals observed that the district judge "could have sentenced Lumumba on the spot if the circumstances warranted such immediate action." 741 F.2d at 15 (citing *Codispoti* v. *Pennsylvania*, 418 U.S. 506, 512-15 (1974)). "Yet, apparently he believed that such was unnecessary and, wishing to avoid the potential disruption of the trial and prejudice to the defendant that would have followed from Lumumba's immediate incarceration, postponed the ultimate disposition." 741 F.2d at 15 (citation omitted). The Second Circuit concluded that a notice and hearing is required when the district court "postpones the ultimate disposition" rather than "sentenc[ing the defendant] on the spot." *Id. See also United States* v. *Stratton*, 779 F.2d 820, 836 (2d Cir. 1985) ("Where punishment is deferred until after trial, summary procedure may not be used"), *cert. denied*, 476 U.S. 1162 (1986); *United States* v. *Dowdy*, 960 F.2d 78, 82 (8th Cir. 1992) (Rule 42(a) procedure appropriate where district court "immediately found [counsel] in contempt and simultaneously sentenced her to pay a fine").

The Second Circuit's opinion in *Lumumba* acknowledged that in *Sacher* v. *United States*, 343 U.S. 1 (1952), this Court held that Rule 42(a) permits a district court, in its discretion,

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[8/] The district court held petitioner in contempt on October 8, 1991. App., *infra*, 2a. It entered an order of conviction and a certificate later that day. The court sentenced petitioner on March 10, 1992. C.A. App. 80.

to defer exercise of the summary punishment power until the completion of the trial. But the Second Circuit concluded "that such is not the present rule and that *Sacher* has limited vitality as precedent, even though it has not been expressly disavowed." *Id.* The Second Circuit correctly reasoned that, because this Court "ha[s] only permitted summary punishment as an immediate necessity to uphold a tribunal's authority . . . [w]here punishment is deferred until another day, the reason for the exception that denied due process disappears." 741 F.2d at 16. That reasoning applies *a fortiori* in this case, because the district court deferred the imposition of punishment until long after the trial was completed.

As the Second Circuit recognized, the continuing authority of *Sacher* is doubtful in the light of this Court's opinion in *Taylor* v. *Hayes*, 418 U.S. 418 (1974). In *Taylor*, a state trial judge held counsel for a defendant in contempt on nine separate occasions during the trial, but did not impose sentence until the conclusion of the trial. This Court reversed the judgment of conviction, holding that due process requires that "before an attorney is finally adjudicated in contempt and sentenced after trial for contempt during trial, he should have reasonable notice of the specific charges and an opportunity to be heard on his own behalf." 418 U.S. at 498-99. Then-Justice Rehnquist, joined by then-Chief Justice Burger, concluded that the holding in *Taylor* was "squarely contrary to the holding in *Sacher*." *Codispoti*, 418 U.S. at 525 (Rehnquist, J., dissenting). *See also Harris* v. *United States*, 382 U.S. 162, 165 (1965) (Rule 42(a) appropriate where "instant and summary punishment . . . [is] necessary").

In sum, the court of appeals' decision merits further review because petitioner would have been entitled to notice and a hearing in other circuits, and because the conflicting

lower court decisions in this area reflect uncertainty about the continuing validity of this Court's own decisions.[9/]

## CONCLUSION

The petition for a writ of certiorari should be granted.[10/]

Respectfully submitted.

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[9/] If this Court grants the petition for a writ of certiorari, petitioner will ask the Court to direct that any proceedings on remand be conducted before a different district judge. The district judge's actions — in particular, her direction that petitioner, who remains an Assistant Federal Public Defender, may not appear before her in any future case — indicate that the judge has become personally embroiled with petitioner. *See Taylor* v. *Hayes*, 418 U.S. at 502 (order "disbarring [defendant] from further practice in [judge's] court" reflected judge's personal involvement).

[10/] In the alternative, the Court may wish to hold the petition for a writ of certiorari in this case pending its decision in *International Union, United Mine Workers of Am.* v. *Bagwell*, No. 92-1625. Although that case presents questions concerning the difference between civil and criminal contempt, it is possible that the Court's decision will shed light on the distinction between summary criminal contempt and non-summary criminal contempt. *See* No. 92-1625 U.S. Br. at 17, 21-22 (discussing implications of petitioners' arguments for summary criminal proceedings).